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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1561

JAMES MARIHART, EDWIN KINSLEY, and MICHAEL GUERRA,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR A WRIT OF CERTIORARI
To the Eighth Circuit Court of Appeals

DONALD W. SYLVESTER
507 Security Bank Building
Sioux City, Iowa
Attorney for Edward Kinsley

FORKER, KANTER & MAHR
By PAUL A. MAHR
232 Davidson Building
Sioux City, Iowa 51101
Attorney for James Marihart

O'BRIEN, GALVIN & O'BRIEN
By DONALD E. O'BRIEN
916 Grandview Boulevard
Sioux City, Iowa 51101
Attorney for Michael Guerra

EVAN L. HULTMAN
United States Attorney for
the Northern District of Iowa

ROBERT L. SIKMA
Assistant United States Attorney
P. O. Box 1138
Sioux City, Iowa 51102
Attorneys for Appellee

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

INDEX

Opinions Below 1
Jurisdiction 2
Statutory Provisions 2
Questions Presented 2
Constitutional Provisions Involved 3
Statement of the Case 3
Argument (Reason for Granting the Writ) 7
Conclusion 14
Appendix—
1. Affidavit of Captain Frank O'Keefe 17
2. Partial Transcript of Testimony at State Court Suppression Hearing 20
Trial Court's Ruling 26

Cases Cited

Aguilar v. *Texas*, 378 U.S. 108 (1964) 2, 7, 8, 10, 15
Draper v. *United States*, 358 U.S. 307 (1959) 9, 10
Spinelli v. *United States*, 393 U.S. 410 (1969) 2, 6, 8, 9, 10, 15
United States v. *Bowling*, 351 F.2d 236 (CA6 1965) 14
United States v. *Carmichael*, No. 71-1492, C.A. 7th Cir., October 9, 1973, 14 Criminal Law 2128, 11-14-73, ... F.2d 7, 14
United States v. *Harris*, 403 U.S. 573 (1971) 7, 8
United States v. *Marihart, et al.*, 472 F.2d 809 (1972) 1, 4, 7, 8, 9
United States v. *Thomas*, No. 74-1403, C.A. 5th Cir., 12-19-73, 42 L.W. 2369, ... F.2d 7, 14

Statutes Cited

18 U.S.C. 1202(a)(1) 3
28 U.S.C. 1254 2
Constitution of the United States, Fourth Amendment 3

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OPINIONS BELOW

The petitioners, James Marihart, Edwin Kinsley, and Michael Guerra were before the Circuit Court of Appeals for the Eighth Circuit on two occasions. The Court of Appeals, on December 26, 1972, filed its Opinion, overruling the suppressing of certain evidence by the trial court; this Opinion is reported at page 809 in 472 F.2d (1972); that thereafter, this case went back to the Northern District of Iowa for trial. The trial was had and resulted in the conviction of each defendant; they appealed to the Court of Appeals and on March 6, 1974, the Court of Appeals affirmed the conviction. This Opinion is, as yet, unreported; the slip opinion is by reference made a part hereof.

JURISDICTION

These petitioners seek to have both the decision of the Court of Appeals as of December 26, 1972, and the decision of the Court of Appeals as of March 6, 1974, reviewed, as one is a continuation of the other and the defendants believe they have preserved all of their rights to permit this, and Judge Heaney has dissented in the second opinion for the same reasons as he set out in the original Opinion; that the last date of any order in regard to this case is the Opinion dated March 6, 1974.

STATUTORY PROVISIONS

The statutory provision believed to confer jurisdiction to this Court to review the judgment in question by Writ of Certiorari is Title 28, United States Code, Section 1254, which reads as follows:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following method:
>
> "1. By Writ of Certiorari granted upon the Petition of any party to any civil or criminal case before or after the rendition of judgment or decree."

QUESTIONS PRESENTED

1. Has the second prong of the *Aguilar* test, as reaffirmed by *Spinelli*, been abandoned by the Supreme Court of the United States? (*Aguilar* v. *Texas*, 373 U.S. 108 (1964); *Spinelli* v. *U. S.*, 393 U.S. 410 (1969).)

2. Whether the affidavit herein discloses the underlying circumstances as to how the informant gained his

information so as to demonstrate sufficient probability to allow a search?

3. Whether inaccuracies and/or misrepresentations in the affidavit submitted by a police official to the magistrate issuing the search warrant vitiates the search warrant issued pursuant thereto?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution as set out in The United States Code Annotated, Constitution, Amendments 1 to 4, page 361, states:

> "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

The defendants were charged by indictment returned and filed in the United States District Court for the Northern District of Iowa on March 22, 1972, for four counts of illegal possession of firearms by previously convicted felons, in violation of Section 1202(a)(1), Title 18, Appendix, United States Code. The indictment charges that the acts occurred on October 20, 1971. The defendants were arraigned on April 3, 1972 and entered pleas of not guilty to each of the charges in the indictment. The case was set for jury trial on April 26, 1972. On April 14, 1972, the defendants filed a motion to suppress evidence which was obtained during the execution of a search warrant

issued by the Honorable John E. Hutchinson, Municipal Court Judge, in Sioux City, Iowa, on October 20, 1971, upon the application of Captain Frank O'Keefe of the Sioux City Police Department. The Government filed a resistance to the motion, and on April 25, 1972, the Honorable Edward J. McManus, Chief Judge, United States District Court for the Northern District of Iowa, granted the defendants' motion to suppress evidence. On April 27, 1972, the Government filed a motion to reconsider. This motion was denied and the Government was granted a continuance for the purpose of appeal. In the Eighth Circuit, the case was entitled *United States of America,* Appellant v. *James Marihart, Edwin Kinsley, and Michael Guerra,* Appellees, and known as cause No. 72-1258 Criminal. It is reported in 472 F.2d 809 (1972). The appellant filed a brief and an appendix, and the appellees filed a brief. Part of each is respectfully made a part of this appeal by reference and appended hereto, and the Court is respectfully requested to consider all of them in ruling on this petition for writ of certiorari.

The appeal was first argued to three judges of the Eighth Circuit and later, at the direction of the Eighth Circuit Court of Appeals, it was argued to the entire Court on November 15, 1972. On December 26, 1972, the Eighth Circuit Court vacated the order suppressing the evidence by the District Court judge, and the cause was remanded for further proceedings not inconsistent with the Court's opinion. Judges Bright and Ross concurring; Judges Lay and Heaney dissenting.

After this decision by the Eighth Circuit Court, the cause came on for trial in Sioux City, Iowa on February 27, 1973. Very early in the trial, the defendants again moved to suppress the guns and were allowed by the trial Court to renew all objections, statements and arguments that had been presented to the Circuit Court of Appeals

or to the trial Court previously as though fully and completely set out. The Government had no objection to that procedure.

The trial was interrupted and a suppression hearing was had. The Court, basing its rulings on the opinion and direction of the Eighth Circuit, overruled the objections of the defendants; all objections relating to the suppression questions were preserved during the trial.

Some of the material facts are as follows: On the evening of October 16, 1971, George Lorenger's residence and firearms dealership was burglarized. Lorenger sold guns in Iowa, Nebraska, South Dakota and California. The four firearms which comprise the four counts of the indictment had been purchased from a dealer in Faribault, Minnesota. On October 17, FBI Special Agent Oxler became apprised of the fact that the defendants might be involved in the Lorenger burglary (R. 306). When he received this information, it meant nothing to him (R. 311). Oxler, at this time, was investigating a Federal crime of possession of stolen money orders. On October 20, a vehicle the FBI had been watching for two weeks pulled up to a residence and the occupants removed a large cardboard box from the rear of the automobile, which they had difficulty carrying into the residence. The FBI notified the local police. After they had vacated the premises, local police officers maintained a watch on the house for three to four hours. During the surveillance, Captain Frank O'Keefe of the Detective Bureau, Sioux City Police Department, allegedly based on the information supplied by Oxler and others, obtained a search warrant from a Sioux City Municipal Court Judge. (The affidavit is appended hereto.) Upon breaking into the residence in execution of the search warrant the police found several rifles and shotguns, including the four guns upon which the indictment rests.

The defendants were first charged in State Court and filed a motion to suppress which stated in pertinent part that "the evidence was obtained as a result of an illegal search and seizure in violation of the Fourth Amendment and that the testimony presented to the issuing magistrate did not sufficiently advise him of the informant's source" of knowledge as required by *Spinelli* v. *United States*, supra.

A hearing was had and a partial transcript of the testimony of Frank O'Keefe, the officer who secured the search warrant, is appended hereto. The State Court overruled the motion to suppress because the charge was breaking and entering, which the State Court found to be a non-possessory offense and therefore declared that these defendants had no "standing" to object.

Subsequently, Federal charges were filed and the suppression question came up again and was sustained by the trial Court and then ensued the appeals as mentioned above.

Thereafter, the trial was completed and the jury found the defendants guilty of all four counts, and on April 25, 1973, the Court sentenced each of them to imprisonment for a period of two years on Count I; two years on Count II; and two years on Count III, said sentences to run consecutively, and two years on Count IV, to run concurrently with the sentence on Count I.

These defendants again appealed to the Eighth Circuit Court of Appeals and both parties to the action filed briefs. The appeal was argued before a panel of three members of the Circuit Court of Appeals, and subsequent thereto, a supplemental brief was filed by both parties of this cause at the request of the Court of Appeals.

On March 6, 1974, the opinion of the Court of Appeals was filed affirming the convictions of these defendants, with Heaney, Circuit Judge, dissenting.

ARGUMENT

(Reason for Granting the Writ)

In its first opinion, 472 F.2d 809 (1972), the Eighth Circuit Court of Appeals has decided a Federal question concerning suppression of evidence in a way which is in conflict with applicable decisions of the Supreme Court of the United States in that, as pointed out in dissent by Judges Lay and Heaney, the majority discarded the second prong of the *Aguilar* test (*Aguilar* v. *Texas*, 378 U.S. 108 (1964)), i.e., whether the affidavit discloses the underlying circumstances as to how the informant gained his information so as to demonstrate sufficient probability of credibility to allow a search.

In its second opinion, not yet reported, but appended hereto, the Eighth Circuit Court has erroneously adopted the standards set out by the Seventh Circuit in *United States* v. *Carmichael*, No. 71-1492, C.A. 7th Cir., October 9, 1973, 14 Criminal Law 2128, 11-14-73, ... F.2d ....., and has rejected the standards set out in the Fifth Circuit Court of Appeals in *United States* v. *Thomas*, No. 74-1403, C.A. 5th Cir., December 19, 1973, 42 L.W. 2369, ... F.2d ..... The decision rendered by the Eighth Circuit Court of Appeals is in conflict with the decisions of the Fifth Circuit Court of Appeals involving the same or similar matters.

We would first like to comment concerning the decision of the Eighth Circuit Court in *United States* v. *Marihart, et al.*, supra. In that case, the majority of the Court stated that the case of *United States* v. *Harris*, 403 U.S. 573 (1971), was in conflict with the *Spinelli* case, 393 U.S. 410 (1969). Judges Wright and Ross, in a concurring opinion, stated that they did not agree with the majority view that

those two cases are in conflict and stated that they felt they were distinguishable (p. 815). Judges Lay and Heaney, in dissenting, stated that they felt that *Aguilar* v. *Texas,* supra, and *Spinelli* v. *United States,* supra, were still controlling, and that in *United States* v. *Marihart,* supra, the majority had discarded the second prong of the *Aguilar* test, doing so, the dissent stated, because, "it senses an inclination of the present Supreme Court to relax the standards by which the credibility of informer's tips are to be judged." (p. 816). Judges Lay and Heaney went on to say, "We refuse to speculate as to what the Court may do in the future, preferring to rest our judgment on what it has done to date. The *Spinelli* case does very little more than offer an explanation of the principles of the *Aguilar* case under a different factual setting." We feel that, as set out in the dissent, the majority opinion misread the *Harris* case in its relationship to *Aguilar* and *Spinelli* (p. 816). The *Aguilar* test requiring disclosure of the underlying circumstances to show that the informant gained his information in a reliable way still is the law of the land. The original trial Court here found this information missing. The clear admonition in *Spinelli* has never been overruled or even doubted (p. 817).

In *Spinelli* as cited in *Marihart* it is stated,

> "A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which, even when partially corroborated, is not as reliable as one which passes *Aguilar's* requirements when standing alone (p. 817).
>
> "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more

substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." (*Spinelli*, 393 U.S. at 415-416.)

That wording in *Spinelli* is, the appellants believe, still the law of the land, and this was misinterpreted by the majority of the Court of Appeals in the case of *United States* v. *Marihart*. Affiant O'Keefe as pointed out in his affidavit and testimony relies on FBI Agent Oxler who said in answer to a question concerning the underlying circumstances of how his informant knew of his information, "I cannot recall how he obtained the information." (R. 312.)

"The fallacy of the majority's ruling is that it assumes, without discussion, the conclusory charge that the defendants had burglarized the house. (It is immaterial that long after the signing of the affidavit for the search warrant one of these defendants entered a plea to burglarizing the house in State Court.) The affidavit is without any detail which discloses that these informants had gained this information in a reliable way and unlike *Draper* (*Draper* v. *U. S.*, 358 U.S. 307 (1959)), it is without any description of the suspects or any projections concerning their future activities. No detailed information is provided that these men placed the guns in a large paste board box, or that they would be at Magnuson's apartment with such a box at the time and place where they were later observed and found. There is no nexus made by the informants between the conclusory statement that the men committed the burglary and that they might be located at a certain time and place which might have provided further credence to their original charge. (*Draper* v. *United States*) The fact that the

informants stated that the men used a certain car with license plates belonging to one Magnuson hardly corroborates the informant's charge that they had committed the offense. This does not differ significantly from the unlisted telephone number rejected in *Spinelli*. (*Marihart* page 817)

"There are undoubtedly some that feel that *Aguilar* and *Spinelli* impose technicalities which unduly restrict effective police enforcement. Actually, *Spinelli* and *Aguilar* impose the simple common sense requirement that the unidentified reliable informant must reveal how he knows that the accused participated in illegal activities. The *Draper* case relaxes this requirement only when the informant describes in sufficient detail future activities which subsequently occur. The rationale of *Draper* is that where the affidavit discloses sufficient corroborative factors which demonstrate a guarantee of personal knowledge of the modus operandi of the criminal activity, the necessary trustworthiness as to the source of the information, as distinguished from the reliability of the informant, is provided. If we stay with these simple rules we will not impede effective law enforcement. If we go outside those rules, we chip away, and erode the rights of all citizens under the Fourth Amendment and as well, confuse law enforcement officers in the performance of their duties." (817)

Defendants submit that the two-pronged test established in the *Aguilar* and *Spinelli* cases is still the law of the land, and it is a good test of probable cause. If all that were needed was a reliable informant with an underworld rumor, peace officers could readily search every private dwelling in the land, if a peace officer could add to the rumor the fact that he saw the person in question

carry a box, package or suitcase into his home large enough to hold the contraband in question. No home would any longer be protected from unreasonable searches and seizures.

As to the opinion of the Circuit Court of Appeals on the second occasion, this matter was presented to them. The Court determined that although there were inaccuracies and/or misrepresentations in the affidavit by Captain O'Keefe, it did not vitiate the search warrant issued as a result of these inaccuracies and misrepresentations. The Court held that the inaccuracies were peripheral in nature and there were no material misstatements made in connection with the securing of a search warrant.

The defendants at this time will not go into the multiple inconsistencies between the affidavit and testimony of Captain O'Keefe and the sworn testimony of FBI Agent Oxler, Lt. Larson and Lt. Stewart for the reason that the Circuit Court opinion in this cause states that some of those inconsistencies are cleared up by the in camera testimony of these witnesses given privately in front of the judge and the United States Attorney's office, and since we haven't seen them, we will not challenge them here. However, there are two glaring, very material inaccuracies and/or misrepresentations that we would like to call to the Court's attention. In his original State Court testimony in support of the resistance to the suppression motion, Captain O'Keefe states on page 15, "I talked to FBI Agent Oxler and that he gave me the name of this confidential informant, and I gave this to the Court." However, in FBI Agent Oxler's testimony (R. 334, l. 21), the question is asked, "Did you tell Captain O'Keefe who your informant was? A. I would seriously doubt if I named a name. I think from past experience he was fully aware who my informant was. I cannot say if I actually told him the name. I doubt it be-

cause of my rules and regulations. I think from conversations with him we didn't have to name names. It was known as just a matter of fact between us." During the trial in an in camera hearing, with the defendants and their attorneys absent, FBI Agent Oxler would not tell the court the name of his informant and was jailed for a few hours until he received permission from Washington and then told the judge. This situation supports his statement that he never told O'Keefe.

This is a very material matter, for on page 16 of the original testimony of Captain O'Keefe, line 19, O'Keefe states: "I divulged the names of these informants and pointed out to Judge Hutchinson, and he remembered an occasion when one of these informants had been used in the past and the information he had furnished to us was very productive, and he was aware of that of his own personal knowledge. However, the second informant, the judge was not familiar with him, nor was I, so we did not try to establish him as a credible or reliable informant."

Therefore, the only reliable informant apparently was the one supposedly supplied to O'Keefe by Oxler. However, according to Oxler, as mentioned above, O'Keefe could have only gotten this by surmise. Can this Supreme Court imagine a situation where Captain O'Keefe is in front of Judge Hutchinson and he tells Judge Hutchinson honestly that he has been talking with Agent Oxler of the FBI and that while he doesn't know for sure he surmises that his informant is, so-and-so, and can you further imagine that the Court would then say, yes, I know so-and-so and I will issue the search warrant on your surmise. This is a very material point, and one which could not have happened in the way O'Keefe sets it out.

The second very material inaccuracy and/or misrepresentation is again contained on page 15 of Captain O'Keefe's original state court testimony wherein he states on line 10

that these defendants had used a 1962 Ford station wagon bearing 47 county Iowa plates and the license number was 4556. O'Keefe there states that he got this information from David Oxler. There is nothing in the entire transcript that shows that anyone else, and specifically, Lt. Larson and Lt. Stewart, ever gave O'Keefe any information concerning the car and license plates.

This statement by O'Keefe was specifically refuted by FBI Agent Oxler in the record at 332, where he was asked the question: "Did the informant specifically tell you that the car was used in the crime, the burglary? A. I cannot say for sure; I do not know."

If he did not know, how could he tell Captain O'Keefe so that Captain O'Keefe could tell the judge so that the affidavit would be properly supported. This is further brought out by the fact that the FBI Agents Oxler and Okonowiezc testified at the suppression hearing that they had been following this specific car with these specific license plates for several days prior to the issuance of the search warrant for entirely different reasons than the theft of any guns (R. 122, lines 7 and 8 and R. 331). This is further supported by the testimony of FBI Agent Okonowiezc when he was asked in the record at 88: "Were you surveilling the area at 1807 Jackson Street or the car in question?" His answer was: "The car." He was then asked: "In other words, the only reason that you were there was that you followed the automobile there." His answer was, "Yes." He further stated that he had no information or concern about the guns and didn't know or suspect there were guns in the box (R. 124, 126).

There were very material inaccuracies and/or misrepresentations in the affidavit which vitiated the search warrant issued thereto.

The Seventh Circuit in *United States* v. *Carmichael*, supra at 2129, has held as follows:

> * * * Evidence should not be suppressed unless the trial court finds that the government agent was either *recklessly or intentionally untruthful.* * * * Even where the officer is reckless, if the misrepresentation is immaterial, it did not affect the issuance of the warrant and there s no justification for suppressing the evidence. * * * However, we conclude that if deliberate government perjury should ever be shown, the court need not inquire as to the materiality of the perjury. The fullest deterrent sanctions of the exclusionary rule should be applied to such serious and deliberate government wrongdoing.
>
> The rule we announce today is intended only to test the credibility of government agents whose affidavits or testimony are before the magistrate.

The Fifth Circuit in *United States* v. *Thomas*, (No. 73-1403, CA5 December 19, 1973) 42 LW 2369 has held that "affidavits containing misrepresentations are invalid if the error was (1) committed with an intent to deceive the magistrate, whether or not the error is material to the showing of probable cause, or (2) *made non-intentionally, but the erroneous statement is material to the establishment of probable cause for the search.*" *Accord, United States* v. *Bowling*, 351 F.2d 236, 241-242 (CA6 1965).

The standards of the 5th Circuit are those which should govern this case.

CONCLUSION

The District Court in the first instance was correct in sustaining the defendants' motion to suppress, because the issuing magistrate had no evidence before him to show

any of the underlying circumstances by which the affiant officer's informant concluded that the defendants had any connection with the criminal activities in question; therefore, he did not have probable cause to issue a search warrant for the premises in question. The *Aguilar-Spinelli* test has not been abandoned.

There were material inaccuracies or misrepresentations in the affidavit herein which vitiated the search warrant issued pursuant thereto.

Respectfully submitted,

O'BRIEN, GALVIN & O'BRIEN
By DONALD E. O'BRIEN
916 Grandview Boulevard
Sioux City, Iowa 51101
Attorney for Michael Guerra

FORKER, KANTER & MAHR
By PAUL A. MAHR
232 Davidson Building
Sioux City, Iowa 51101
Attorney for James Marihart

DONALD W. SYLVESTER
507 Security Bank Building
Sioux City, Iowa
Attorney for Edward Kinsley

EVAN L. HULTMAN
United States Attorney for
the Northern District of Iowa

ROBERT L. SIKMA
Assistant United States Attorney
P. O. Box 1138
Sioux City, Iowa 51102
Attorneys for Appellee

APPENDIX

Affidavit for Search Warrant

(Filed October 28, 1971)

WOODBURY COUNTY)
) ss.
STATE OF IOWA)

FRANK O'KEEFE, being first duly sworn on oath, depose and states that he is a resident of said County and State, and that he believes, and has substantial grounds to believe, that the defendant is keeping:

see attached list

at

That said property above-described is being illegally held, and that affiant believes, and has substantial reason and cause to believe

and therefore makes complaint and requests that a due and proper Search Warrant issue forthwith for the search of the above-described premises for the property hereinbefore set out.

/s/ Frank O'Keefe

SUBSCRIBED AND SWORN to before me this 20th day of October, 1971.

/s/ John E. Hutchinson
Judge, Municipal Court
Sioux City, Iowa

THE FOLLOWING LIST OF FIREARMS TAKEN FROM THE GEORGE LORENGER RESIDENCE, 1000 South Cornelia, Sioux City, Iowa, October 16th between 7:00 P.M. and 8:50 P.M. as a result of a breakin:

(List omitted but it includes those involved here)

STATE OF IOWA)
) ss.
WOODBURY COUNTY)

I, FRANK O'KEEFE, being first duly sworn on oath state as follows:

THAT I am a Captain in Charge of the Detective Bureau, Sioux City Iowa Police Department.

THAT on 10-16-71 between 7:30 P.M. and 8:45 P.M. the home of GEORGE A. LORENGER, 1000 South Cornelia was burglarized. Taken in this burglary were thirty-three (33) firearms consisting of hand guns, shotguns, and rifles.

I received information from a reliable confidential informant who stated that the following men were involved in this burglary: JAMES MARIHART, EDWIN W. KINSLEY, AND MICHAEL GEREAU. At the time of this burglary, these men were driving a 1962 Blue Ford Station Wagon, 1971 Plates Iowa 47-4556. At the time, this car was registered to RAY MAGNUSON. This car was used in the commission of this crime.

THAT since that time I received the following information from DAVE OXLER, SPECIAL AGENT FBI who stated that between 11:00 A.M. and 11:30 A.M. Wednesday, 10-20-71, that he had occasion to be in the area of the 1800 Block Jackson. That while at this location, he

saw the blue 1962 Ford Station Wagon License Number 47-4556 stop in front of 1807 Jackson. That there were three men in this vehicle believed to be the men named in this affidavit and who perpetrated this crime. That these men unloaded a large pasteboard box approximately five feet in length, and it appeared to have tape around it. This box is believed to contain some of the firearms which were stolen from the residence of GEORGE LORENGER on 10-16-71. MR. OXLER stated that these three men had difficulty carrying this box into the residence at 1807 Jackson. He stated they entered the north door of this multiple dwelling. Further investigation revealed that this door leads to Apartment No. 2, and this apartment is vacant.

We have reason to believe that these weapons are now concealed in this vacant apartment.

A check with MARVIN DICUS, Apartment No. 6, 1807 Nebraska revealed that this multiple dwelling is under the custody and control of RAY MAGNUSON.

THAT DAVE OXLER is familiar with the vehicle and persons named herein, concerning investigations being made by the FBI.

/s/ Frank O'Keefe
Captain Frank O'Keefe
Commanding Officer
Detective Bureau

SUBSCRIBED AND SWORN TO BEFORE ME BY Frank O'Keefe this 20th day of October 1971.

/s/ John E. Hutchinson
Judge, Municipal Court
Sioux City, Iowa

On this 20th day of October, 1971, I examined under oath, the said Frank O'Keefe, and find that the mentioned informant has previously given him information which has proved to be reliable & true.

/s/ John E. Hutchinson
Judge

APPENDIX 2

Transcript of Testimony, State District Court, Woodbury Co., Iowa

[12] Mr. Mahr: The defendant Marihart joins in the objections urged by both counsel.

Mr. O'Brien: I would like to adopt it as to any of the statements made by Mr. Sylvester.

Mr. Sylvester: May the record show this is a continuing objection to any testimony from Officer O'Keefe so it will not have to be urged again?

The Court: The objection and exceptions to the reopening of the hearing are overruled. They are noted and overruled. The general objection stated by Mr. Sylvester may stand as objection to any testimony received at this time without being reiterated to every question. However, if any counsel has any specific objection to any of the testimony offered, specific objection should be made. This is just a general objection which may stand.

You may proceed, Mr. Seff.

Mr. Seff: Thank you, your Honor.

FRANCIS O'KEEFE,

called as a witness on behalf of the State, having been first duly sworn by the court, testified as follows:

Direct Examination by Mr. Seff

Q. State your name please. A. Francis O'Keefe.

[13] Q. What is your occupation? A. I am Captain on the Sioux City, Iowa, Police Department.

Q. You previously testified at the hearing on the motion to suppress previously in these three combined cases, is that correct? A. Yes, sir, I did.

Q. I call your attention to the 20th of October, 1971, at approximately 1:30 p.m. On that date did you have occasion to make application for a search warrant for the residence at 1807 Jackson street? A. Yes, sir, I did.

Q. In accordance with the application you made, did you present to Municipal Judge John Hutchinson an affidavit and search warrant forms? A. Yes, sir, I did.

Q. Which you then gave to the Judge? A. Yes, sir.

Q. In regard to this search warrant application form you filled out and the affidavit you signed, did you have any conversation with Judge Hutchinson?

Mr. Mahr: I object to this as being incompetent, irrelevant and immaterial unless it is shown the statement was made under oath.

The Court: You may answer.

A. Yes, sir.

[14] Mr. Sylvester: Can I ask one question for objection?

The Court: Yes.

By Mr. Sylvester:

Q. Officer O'Keefe, when you had this conversation with Judge Hutchinson, had you been—were you under oath? A. He put me under oath when I presented him with the search warrant, copies of the search warrant, the application and affidavit that was attached thereto, yes, sir.

Q. Did that oath pertain to the written material you presented to him? A. What he did was, he put me under oath, read the search warrant and affidavits, the accompanying affidavit that I had signed, and asked me if I had any further information to furnish the court in connection with this matter.

Q. With this further information were you under oath? A. Yes, sir. He put me under oath before he read the warrants.

Mr. Sylvester: That's all.

By Mr. Seff:

Q. So Captain O'Keefe, you were under oath when you gave this information orally to Judge Hutchinson? A. Oh, yes. Yes.

Q. Would you inform the court as to the substance of the conversation which you did have with Judge Hutchinson relative to the issuance of the search warrant. [15] A. I went back and recapped the information in connection with the burglary of the George Lorenger residence and about the fire arms that were taken and the date it happened. I told him on Sunday, I believe the 17th of October, that in the late afternoon that a special agent of the FBI, David Oxler, had called me at my home and discussed this burglary with me. He told me that he had been informed by a confidential reliable informant that James Marihart, Edwin Kinsley and Michael Guerra

had committed this burglary, that they had used a '62 Ford station wagon bearing 47 county Iowa plates, the license number was 4556. He gave me the name of his confidential informant. We discussed this matter at some length on the telephone. I further informed Judge Hutchinson shortly thereafter a Lieutenant in my office, Michael Larson, called me at my home and discussed this particular burglary with me, told me that he had talked to a confidential informant and gave me the same information, the same names, that special agent Oxler had given me in connection with this burglary, as well as to the vehicle.

About thirty minutes or an hour later, Sergeant Ray Stewart called my home. His call was in regard to this particular burglary. He related the same information that I had received from Agent Oxler and Lieutenant Larson [16] and he also named his informant, and the first two, Officers Oxler and Larson gave me the name of one informant, and that Sergeant Stewart gave me the name of another informant. I told Judge Hutchinson the names of these two people.

I further told him that that morning between 11:00 and 11:30 that Agent Oxler of the FBI, and Roger Okuniwiecz, they had occasion to be in the 1800 block of Jackson street, that they saw this vehicle that had been used in the perpetration of this crime, with three men in it, they saw them go into 1807 Jackson street into a certain apartment, that they carried a large pasteboard box into this apartment, and that they had got close enough to these people to identify them and they knew who they were because of a previous investigation.

I further told the Judge we had checked the property and found out the right apartment, the fact of who was in care and control of this property, and he was named on the warrant. I divulged the names of these informants

and pointed out to Judge Hutchinson, and he remembered an occasion when one of these informants had been used in the past and the information he had furnished to us was very productive, and he was aware of that of his own personal knowledge. However, the second informant, the Judge was not familiar with him nor was I, so we did not [17] try to establish him as a credible or a reliable informant.

After I had completed this narration to Judge Hutchinson, he turned the warrant over and on the back of the affidavit made some notations and signed them. I don't recall just what they were. I took the warrants in to the Clerk of Court and had them registered and certified and proceeded to have the warrants served.

Q. Captain O'Keefe, you did give—of course, the warrant was made out to search the residence owned by Raymond Magnussen? A. Yes, sir.

Q. This was 1807 Jackson street? A. Yes, sir. Apartment No. 2.

Q. Apartment 2. A. I might say also, Mr. Seff, that —I forgot what I was going to say. I will think of it.

Q. The information and things you related, plus the affidavit which is already a part of the record, indicated to your knowledge these guns were at the location— A. Yes, sir.

Q. - - - of 1807 Jackson street? A. Yes, sir.

Mr. Mahr: I object to this as calling for the opinion and conclusion of the witness; irrelevant, immaterial [18] and incompetent.

The Court: Sustained. The answer will be stricken.

Mr. Seff: No further questions.

Mr. O'Brien: Could we talk just a minute?

The Court: Yes. Would you like to go in Chambers?

Mr. O'Brien: Fine.

(Counsel confer).

Mr. Seff: Your Honor, could I ask one more question?

The Court: You may go ahead.

Q. Captain O'Keefe, how many times or on how many occasions did you talk to this informant? A. I informed Judge Hutchinson that I had talked to him briefly on Monday, October 18th, and then again just before noon on October 20th, which would be the day I obtained the warrants. That was a Wednesday.

Q. Did this conversation which you had with the informant, did that pertain to the location of the stolen guns? A. The second conversation that was held on Wednesday the 20th, all the conversation was pertaining to the location of the guns, or most of it.

Q. This you related to Judge Hutchinson, is this correct? A. Yes, sir.

Q. From your conversation, which you did relate to the Judge, with this informant it became clear to you from the informant that the guns were located at 1807 Jackson street?

[19] Mr. Sylvester: I object, your Honor, calling for the opinion and conclusion of the witness.

The Court: You may answer.

A. We had strong reason to believe the guns were in the Apartment 2 at 1807 Jackson street, yes, sir.

Mr. Seff: No further questions.

Mr. O'Brien: Your Honor, I would like to move to strike any testimony by this witness concerning matters of which he did not directly talk to the informant. It has been a little confusing to me, at the last he testified that he had talked to Mr. Oxler and he told the Judge that Oxler said I have an informant, then he testified he had talked to Michael Larson and he said Michael Larson had an informant. Then he said he talked to Mr. Stewart and

he said Mr. Stewart had an informant. He said these people had all talked, not to Captain O'Keefe, but to the people just named. I would move to strike any information he got second hand as being hearsay on hearsay and, I don't know, but I think that his testimony in the last couple of minutes about talking to an informant, he apparently is talking to Stewart and to Larson and to Oxler because he has not testified, as far as I know, that he talked directly with this person. For that reason, we move to strike all information based on hearsay on top of hearsay.

Honorable Edward J. McManus's Order, U. S. District Court, of April 25, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

72-Cr-3007-W

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES MARIHART, EDWIN KINSLEY, and MICHAEL GUERRA,
Defendants.

(Filed April 25, 1972)

This matter is before the court on defendants' Motion for Bill of Particulars and Motion for Severance and Separate Trials filed April 12, 1972, defendants' Motion to Suppress Evidence filed April 21, 1972, and plaintiff's resistances thereto. The motions will be discussed seriatim. . . .

MOTION TO SUPPRESS EVIDENCE

Defendants seek to have evidence regarding certain firearms suppressed on the grounds that the search warrant by which the police obtained the firearms was issued on the basis of an affidavit which did not comply with the requirements of section 751.4, Code of Iowa 1971, nor meet the standards enunciated by the United States Supreme Court in *Aguilar* v. *Texas*, 378 U.S. 108 (1964) and reaffirmed in *Spinelli* v. *United States*, 393 U.S. 410 (1969).

The court need not determine whether Judge Hutchinson upon issuing the search warrant complied with section 751.4 of the Iowa Code for it appears to the court that the affidavit upon which the warrant is based contains a patent defect under the standards set forth in the *Aguilar* and *Spinelli* decisions.

It also appears from the record that there is no issue of fact necessary to the decision of the motion. All parties appear to agree that the affidavit of Captain O'Keefe and a transcript of his testimony attached to defendants' Brief in Support of Motion to Suppress Evidence are true and accurate copies of the documents they purport to be. Thus, the court is of the view that the reception of evidence is unnecessary and will consider the motion on the basis of the undisputed facts in the record. *See* Rule 41 (e), FRCrP.

The court is mindful that affidavits for search warrants which are usually prepared in the haste of a criminal investigation by non-lawyers must not be given hypertechnical scrutiny but must be read with a commonsense, realistic interpretation. *United States* v. *Ventresca*, 380 U.S. 102, 108-09 (1965). However, the affidavit must state grounds by which the court officer issuing the war-

rant can in light of his knowledge and experience make an independent determination of probable cause. *United States* v. *Pascente*, 387 F.2d 923, 924 (7th Cir. 1967) *cert. denied* 390 U.S. 1005 (1968); *Irby* v. *United States*, 314 F.2d 251, 253 (D.C. Cir.) *cert. denied* 374 U.S. 842 (1963).

The United States Supreme Court stated a "two-pronged rule" in *Aguilar* and *Spinelli* for crediting hearsay information in establishing probable cause for the issuance of a search warrant. Essentially this rule can be stated as follows: An affidavit based on an informant's tip may support a search warrant if it discloses to the magistrate some of the underlying circumstances by which the affiant-officer concluded the informant was credible as well as some of the underlying circumstances supporting the informant's conclusion of a defendant's connection with the criminal activity.

The court finds the first prong of the *Aguilar-Spinelli* test—the credibility of the informant—sufficiently satisfied, especially when considered in light of the recent Supreme Court pronouncement in *United States* v. *Harris*, 403 U.S. 573 (1971) which held that an allegation in the affidavit of an informant's past reliability is not even essential if other information appears which supports his credibility.

The court, however, finds the requirement of the second prong unsatisfied. In *Harris*, the Chief Justice writing for the Court upheld the search warrant and in dicta distinguished the case before the Court and *Jones* v. *United States*, 362 U.S. 257 (1960) from *Spinelli* on the ground that in the *Harris* and *Jones* cases the affidavit purported to relate the personal observations of the informant whereas in *Spinelli* the affidavit failed to explain how the informant came by his information. *United States* v. *Harris, supra*, at 581.

The affidavit in the case before this court like that in *Spinelli* does not state any of the underlying circumstances on which the informant concluded that defendants had committed the burglary in which the firearms were taken. There is nothing in this record independent of the informant's conclusions suggesting any criminal activity on the part of defendants. Thus, compliance with the second prong of *Aguilar-Spinelli* is lacking.

It is therefore the view of the court that since the affidavit of Captain O'Keefe fails to state how his informant came by his information connecting the defendants with the burglary it was insufficient to establish probable cause for the issuance of the search warrant and the evidence must be suppressed.

It is therefore

ORDERED

1. Defendants' Motions for Bill of Particulars and for Severance and Separate Trials are denied.

2. Defendants' Motion to Suppress is granted.

April 25, 1972.

/s/ Edward J. McManus
Edward J. McManus
Chief Judge
United States District Court

SUPREME COURT, U. S.

FILED

MAY 3 1974

JR., C

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1561

JAMES MARIHART, EDWIN KINSLEY, and MICHAEL GUERRA,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

SUPPLEMENTAL APPENDIX

DONALD W. SYLVESTER
507 Security Bank Building
Sioux City, Iowa
Attorney for Edward Kinsley

FORKER, KANTER & MAHR
By PAUL A. MAHR
232 Davidson Building
Sioux City, Iowa 51101
Attorney for James Marihart

O'BRIEN, GALVIN & O'BRIEN
By DONALD E. O'BRIEN
916 Grandview Boulevard
Sioux City, Iowa 51101
Attorney for Michael Guerra

EVAN L. HULTMAN
United States Attorney for
the Northern District of Iowa
ROBERT L. SIKMA
Assistant United States Attorney
P. O. Box 1138
Sioux City, Iowa 51102
Attorneys for Appellee

E. L. MERSEREAU, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-2000

INDEX

Opinion, United States Court of Appeals, Eighth Circuit 1
Slip Opinion, United States Court of Appeals, Eighth Circuit 20

UNITED STATES of America,
Appellant,

v.

James MARIHART et al., Appellees.

No. 72-1258.

United States Court of Appeals,

Eighth Circuit.

Submitted Nov. 15, 1972.

Decided Dec. 26, 1972.

Prosecution for possessing firearms which were transported in and affected interstate commerce, in violation of federal law. The United States District Court for the Northern District of Iowa, Edward J. McManus, Chief Judge, entered an order suppressing firearms, on ground that they had been obtained as result of illegal search, and the government appealed. The Court of Appeals, Matthes, Chief Judge, held that where credibility of informer was proven by magistrate's personal knowledge of his past reliability, informer provided specific information as to number of suspects and year, make, model, color and license number of automobile related by informer to have been used in burglary and theft of rifles, and such information was corroborated when officers observed trio unload a heavy box of sufficient dimensions to conceal weapons and deposit it in vacant apartment under control of owner of vehicle and identical tips had been received by other officers from another informant, there was probable cause for issuing warrant, notwithstanding that affidavit seeking warrant was insufficient in that it did not, in itself, show underlying circumstances from which informant reached conclusion conveyed in tip.

Order vacated and cause remanded.

Bright and Ross, Circuit Judges, concurred and filed opinion; Lay and Heaney, Circuit Judges, dissented and filed opinion.

1. Searches and Seizures (Key) 3.6(3)

Even if the two-pronged test of the Aguilar decision, that is, that officer seeking search warrant on basis of information received from confidential informant disclosed (1) circumstances justifying the magistrate to conclude the informant was credible and (2) circumstances from which informant reached conclusion conveyed in his tip, is not met, the information before the magistrate may be sufficient to establish probable cause authorizing issuance of search warrant if it is sufficiently detailed, or sufficiently corroborated, to supply as much trustworthiness as does the Aguilar test. U.S.C.A.Const.Amend. 4.

2. Searches and Seizures (Key) 3.6(3)

In determining credibility of an informer's tip in cases where affidavit seeking search warrant does not meet the second-prong of the Aguilar test, in that it does not state any of the underlying circumstances from which the informant reached conclusion conveyed in his tip, the question is one of reliability of method by which the informer acquired his information, and not his talents as prognosticator; thus, a combination of detail and corroboration of past and future incriminating conduct will suffice. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures (Key) 3.6(4)

Where credibility of informer was proven by magistrate's personal knowledge of his past reliability, informer provided specific information as to number of suspects and year, make, model, color and license number of automobile

related by informer to have been used in burglary and theft of rifles, and such information was corroborated when officers observed trio unload a heavy box of sufficient dimensions to conceal weapons and deposit it in vacant apartment under control of owner of vehicle and identical tips had been received by other officers from another informant, there was probable cause for issuing warrant, notwithstanding that affidavit seeking warrant was insufficient in that it did not, in itself, show underlying circumstances from which informant reached conclusion conveyed in tip. U.S.C.A.Const. Amend. 4.

Robert L. Sikma, Asst. U. S. Atty., Sioux City, Iowa, for appellant.

Donald W. Sylvester and Donald E. O'Brien, Sioux City, Iowa, for appellees.

Before MATTHES, Chief Judge, and MEHAFFY, GIBSON, LAY, HEANEY, BRIGHT, ROSS and STEPHENSON, Circuit Judges, en banc.

MATTHES, Chief Judge.

The defendants (appellees) stand jointly charged in a four count indictment returned on March 22, 1972, with possessing four firearms which were transported in and affected interstate commerce in violation of Tit. 18 App. U.S.C. § 1202(a)(1).[1] On April 14, 1972, the defendants filed a joint motion to suppress the firearms described in the indictment on the grounds, inter alia, that the weapons were obtained as the result of an illegal search and seizure in violation of the Fourth Amendment to the United States Constitution and because the information presented to the magistrate who issued the search warrant did not sufficiently delineate the "informant's" source of knowl-

1. Each count charges possession on October 20, 1971, of a different firearm, and also alleges all of the defendants have previously been convicted of a felony.

edge as required by Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). The district court entered an order suppressing the firearms and this appeal followed.

I. BACKGROUND

The application for the search warrant was made on October 20, 1971, in the Municipal Court of Sioux City, Iowa, by Francis O'Keefe, Captain of Detectives of the Sioux City police force. The application was supported by O'Keefe's affidavit, which is reprinted in full in the margin,[2] and his oral testimony given under oath before the

2. The body of Captain O'Keefe's affidavit recited as follows:

I, FRANK O'KEEFE, being first duly sworn on oath state as follows:

THAT I am a Captain in Charge of the Detective Bureau, Sioux City Iowa Police Department.

THAT on 10-16-71 between 7:30 P.M. and 8:45 P.M. the home of GEORGE A. LORENGER, 1000 South Carnelia was burglarized. Taken in this burglary were thirty-three (33) firearms consisting of hand guns, shotguns, and rifles.

I received information from a reliable confidential informant who stated that the following men were involved in this burglary: JAMES MARIHART, EDWIN W. KINSLEY, AND MICHAEL GEREAU. At the time of this burglary, these men were driving a 1962 Blue Ford Station Wagon, 1971 Plates Iowa 47-4556. At the time, this car was registered to RAY MAGNUSON. This car was used in the commission of this crime.

THAT since that time I received the following information from DAVE OXLER, SPECIAL AGENT FBI who stated that between 11:00 A.M. and 11:30 A.M. Wednesday, 10-20-71, that he had occasion to be in the area of the 1800 Block Jackson. That while at this location, he saw the blue 1962 Ford Station Wagon License Number 47-4556 stop in front of 1807 Jackson. That there were three men in this vehicle believed to be the men named in this affidavit and who perpetrated this crime. That these men unloaded a large pasteboard box approximately five feet in length, and it appeared to have tape around it. This blox [sic] is believed to contain some of the firearms which were stolen from the residence of GEORGE LORENGER on 10-16-71. MR. OXLER stated that these three men had difficulty carrying this box into the residence at 1807 Jackson. He stated they entered the

issuing magistrate.[3] His live testimony contained the supplementing information that he had been told by three separate police officers that each had received informer tips identical to that recited in the affidavit; that FBI Special Agent Oxler and Sioux City Lieutenant Larson had received tips from the same informant; and that one Sergeant Stewart of the Sioux City police had received the identical tip from another informant. O'Keefe further testified that he had twice interviewed the informant mentioned by Oxler and Larson to verify the contents of the tip, particularly questioning him about the location of the guns.

After presenting the affidavit and supporting testimony to the magistrate, O'Keefe revealed to him the name of Oxler and Larson's informer. Since the judge recognized this informer as a person who had previously supplied reliable information upon which the judge had acted and which proved correct, he relied upon that informant's tip and made no effort to ascertain the credibility of Stewart's informer.

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north door of this multiple dwelling. Further investigation revealed that this door leads to Apartment No. 2, and this apartment is vacant.

We have reason to believe that these weapons are now concealed in this vacant apartment. A check with MARVIN DICUS, Apartment No. 6, 1807 Nebraska revealed that this multiple dwelling is under the custody and control of RAY MAGNUSON.

THAT DAVE OXLER is familiar with the vehicle and persons named herein, concerning investigations being made by the FBI.

(s) Frank O'Keefe
Captain Frank O'Keefe
Commanding Officer
Detective Bureau

3. At a suppression hearing in state court relating to this same warrant Captain O'Keefe testified in detail as to the contents of his oral testimony to the magistrate who issued the warrant. The transcript of this testimony was placed in evidence on the motion to suppress here at issue.

Based upon the officer's written affidavit and his supplementing sworn testimony, the warrant was issued by the magistrate, and executed by police officers who found, in the apartment described in the affidavit and specified in the warrant, the four guns which are the subject of the indictment.

The district court, in sustaining the motion to suppress, reasoned that the Supreme Court had laid down a "2-prong rule" in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli, supra*, to wit: the affidavit for the warrant must disclose (1) circumstances justifying the magistrate to conclude the informant was credible, and (2) circumstances supporting the informant's conclusion of the defendants' connection with the criminal activity. The court found the first prong—the credibility of the informant—had been sufficiently satisfied, and that finding is not challenged here by appellees. But the court found the second prong unsatisfied. In so deciding, the court reasoned:

> "The affidavit in the case before this court like that in *Spinelli* does not state any of the underlying circumstances on which the informant concluded that defendants had committed the burglary in which the firearms were taken. There is nothing in this record independent of the informant's conclusions suggesting any criminal activity on the part of defendants. Thus, compliance with the second prong of *Aguilar-Spinelli* is lacking.
>
> It is therefore the view of the court that since the affidavit of Captain O'Keefe fails to state how this informant came by his information connecting the defendants with the burglary it was sufficient to establish probable cause for the issuance of the search warrant and the evidence must be suppressed."

Thus, because *Aguilar's* second prong was not satisfied, the district court granted the suppression order. The government then sought reconsideration of the order, contesting for the first time the standing of defendants to challenge the search and seizure. This issue was rejected by the court and this appeal followed.

II. STANDING ISSUE

The government's contention that defendants lack standing to contest this search is premised on evidence which tends to show that defendants had no interest, possessory or otherwise, in the apartment where the guns were seized. However, regardless of the merits of the argument espoused by the government, we prefer to and do assume *arguendo* that the defendants possessed the requisite standing and go directly to the issue of the validity of the search warrant.

III. THE VALIDITY OF THE SEARCH

The essential question presented by defendants' objections to this search is whether there was probable cause for the issuance of the warrant pursuant to which the search was conducted. Since without the informer's tip the officers' information would have consisted solely of knowledge of the occurrence of the burglary and observation of the act of removing a heavy, cardboard box from a car into a vacant apartment, it is clear the reliability of the informer's tip is essential to the validity of the warrant. Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959). In this case, as in most similar cases, the magistrate could easily have found that the affiant officer accurately repeated the informer's tip and that the tip, if true, furnished probable cause for issuance of a warrant. The focal problem in these cases, then, is whether the magistrate was given sufficient basis for crediting the

informer's tip. This is a problem which has received considerable attention from the courts, notably the Supreme Court,[4] to whose opinions we now turn.

A.

The convenient starting place in discussing Supreme Court caselaw on informers' tips is Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959). In that case the information the Supreme Court deemed sufficient to credit the tip was twofold. First, the officers swore to the informer's past reliability in furnishing information. Second, the reliability of the contents of this particular tip was shown by the fact the police independently corroborated every facet of the tip's detailed description of the suspect and his activities except the essential fact that he had heroin in his possession. Then, in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), the Supreme Court laid down a standard for testing the credibility of informers' tips which took no cognizance of the *Draper* holding that corroboration of part of the tip infers the remainder is reliable. Instead, the Court held that the magistrate must be told not only "some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable' " but also "some of the underlying circumstances from which the informant" reached the conclusions conveyed in his tip. 378 U.S. at 114, 84 S.Ct. at 1514.

4. *See* United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971); Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); McCray v. Illinois, 386 U.S. 300, 301-305, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Rugendorf v. United States, 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed.2d 887 (1964); Jones v. United States, 362 U.S. 257, 267-273, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959); Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959).

[1] The Court soon made clear, however, that the prophylactic rule announced in *Aguilar* did not overrule *Draper sub silentio.* In Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), the Court expressly reaffirmed *Draper* and enunciated the following alternative test:

> "The informer's report must first be measured against *Aguilar's* standards so that its probative value can be assessed. If the tip is found inadequate under *Aguilar,* the other allegations which corroborate the information contained in the hearsay report should then be considered. At this stage as well, however, the standards enunciated in *Aguilar* must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* tests without independent corroboration? *Aguilar* is relevant at this stage of the inquiry as well because the tests it establishes were designed to implement the long-standing principle that probable cause must be determined by a 'neutral and detached magistrate,' and not by 'the officer engaged in the often competitive enterprise of ferreting out crime.' Johnson v. United States, 333 U.S. 10, 14 [68 S.Ct. 367, 92 L.Ed. 436] (1948). A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which—even when partially corroborated—is not as reliable as one which passes *Aguilar's* requirements when standing alone.
>
> . . . In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more

substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

The detail provided by the informant in Draper v. United States, 358 U.S. 307 [79 S.Ct. 329, 3 L.Ed.2d 327] (1959), provides a suitable benchmark. While Hereford, the Government's informer in that case, did not state the way in which he had obtained his information, he reported that Draper had gone to Chicago the day before by train and that he would return to Denver by train with three ounces of heroin on one of two specified mornings. Moreover, Hereford went on to describe, with minute particularity, the clothes that Draper would be wearing upon his arrival at the Denver station. A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way."

393 U.S. at 415-417, 89 S.Ct. at 588, 589. *Spinelli* thus stands squarely for the proposition that even if the two-pronged test of *Aguilar* is not met, the information before the magistrate may be sufficient if, as in *Draper*, it is sufficiently detailed, or sufficiently corroborated, to supply as much trustworthiness as does the *Aguilar* test. See Judge (now Mr. Justice) Blackmun's opinion in United States v. Mitchell, 425 F.2d 1353 (8th Cir.), cert. denied, 400 U.S. 853, 91 S.Ct. 85, 27 L.Ed.2d 90 (1970).

The Supreme Court caselaw on this subject has its most recent pronouncement in United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971). While we think the present case can be decided solely on *Spinelli's* reaffirmation of *Draper*, the *Harris* case merits attention because the Supreme Court majority in that case, while unable to agree to an opinion, was able to agree to a judg-

ment which indicates a measure of disagreement with the result in *Spinelli*. See especially Mr. Justice Blackmun's concurring opinion, 403 U.S. 585, 91 S.Ct. 2075.[5]

In *Harris*, there was no averment of underlying circumstances to support the informer's credibility and thus the first of *Aguilar's* two prongs was not satisfied. Furthermore, unlike *Draper*, none of the tip was corroborated by independent investigation. The corroboration consisted solely of the suspect's past record and reputation and other unspecified tips from undisclosed informants. The Court nevertheless affirmed the validity of the warrant, primarily because, according to the Chief Justice's plurality opinion, the underlying circumstances by which the informer acquired his information were said by the informer to be firsthand observation and activity, and because the credibility of this claim of firsthand knowledge was bolstered both by the fact it constituted an admission against penal interest and because the substance of the claim was corroborated to the extent mentioned above.

[2] Thus *Harris*, it seems to us, indicates the inclination of the present Supreme Court to relax the standards by which the credibility of informers' tips are to be judged and to avoid the mechanical application of prophylactic rules such as the *Aguilar* test. Yet, we need not rely in this case upon prognostication of future cases. The alternative test enunciated in *Spinelli* is clearly satisfied

5. A number of the judges composing this court's present majority were, like Mr. Justice Blackmun, members of the *en banc* majority reversed by the Supreme Court in *Spinelli*, *see* 382 F.2d 871 (8th Cir. 1967), and many of us agree with his statement that "Nothing this [the Supreme] Court said in *Spinelli* convinced me to the contrary." 403 U.S. at 586, 91 S.Ct. at 2083. However, we will of course continue diligently to apply the law as announced in *Spinelli* so long as the Court adheres to it. Indeed, no relaxation of the *Spinelli* standards is needed to approve the present warrant.

here.[6] It does seem to us, however, that in view of the concurring opinions of Mr. Justice White in *Spinelli* and Mr. Justice Blackmun in *Harris*, in view of the marked difference in tone between *Harris* and *Spinelli*, and in view of the split voting pattern in those two cases, the lower federal courts would be well served if the Supreme Court would clarify its views as to warrants and searches premised upon informers' tips.

B.

[3] In applying *Spinelli's* alternative test to the facts of the present case, we first apply the *Aguilar* test—the sufficiency of the showing furnished the magistrate of (1) the underlying circumstances showing the credibility of

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6. Contrary to the averment in the dissenting opinion, the majority does not decide this case as it has "because it senses 'an inclination of the present Supreme Court to relax the standards by which the credibility of informer tips are to be judged.'" Nor do we think, as the dissent asserts, that our opinion "discards the second prong of the *Aguilar* test" or "suggests that Harris v. United States . . . has destroyed the underpinnings of" *Aguilar's* second prong. As we stated in the text above before the dissent was penned, we do think *Harris* indicates the present Supreme Court's discomfort with *Spinelli's* result, but we need not rely upon that view to decide the case as we have. It was the *Spinelli* opinion itself which authorized substituting the *Draper* test for *Aguilar's* second prong; thus the present majority opinion has faithfully complied with *Spinelli* in relying upon *Draper* instead of *Aguilar*. As the dissenting opinion ultimately reveals, the real difference between the majority and dissenters in this case is not over the law as stated in *Aguilar* and *Spinelli*, but the conclusion one reaches after applying *Draper* to the facts of this case. The dissent says that "*Draper* relaxes [*Aguilar's* second prong] . . . only where the informant describes in sufficient detail future activities which subsequently occur." As demonstrated in Part III B of this opinion, we do not believe *Draper* is limited to the degree of detail of tips of future activity. The question is the reliability of the method by which the informer acquired his information, not his talents as a prognosticator. Thus a combination of detail and corroboration of past and future incriminating conduct will suffice. The only reason it was important in *Draper* that the tip predicted future conduct was because the tip concerned a crime which had not yet occurred. Where, as here, the crime precedes the tip, we think it misreads *Spinelli* and *Draper* to say the tip is accurate only if it predicts additional future conduct by the suspected parties.

the informer or the reliability of his information, and (2) the underlying circumstances from which the informer reached the conclusions he conveyed in the tip, which here were his statements that these defendants were the burglars and used the specifically described car in the burglary. Here, of course, as found by the district court, *Aguilar's* first prong is amply satisfied. The magistrate himself recalled that the informer, whose name was revealed to him, had furnished reliable information on which the magistrate had acted in the past. However, the second prong of *Aguilar* is not satisfied because Captain O'Keefe revealed nothing to the issuing judge that would indicate the basis of the informer's conclusions. We turn then to the alternative to the *Aguilar* test, *Draper*: whether the informer's tip was sufficiently detailed and corroborated to indicate its probable reliability. We think that test is clearly satisfied here.

First, unlike most other informer tip cases, the officers here were investigating a known crime, not a crime whose existence was evidenced only by the informer's tip. *Compare Harris, Spinelli, McCray, Beck, Aguilar, Jones* and *Draper, supra* note 4, *with* Rugendorf v. United States, *supra* note 4. Second, the officers observed the three suspects named by the informer driving a car which belonged to someone else and which was identical in year, make, model, color and license number to the car said by the informer to have been used by them in the burglary. Third, the officers observed the three suspects unload from that car a very heavy, five foot long cardboard box, which could well contain some of the stolen guns, and deposit the box in an apartment which was not only vacant but also in a building under the control of the owner of the car. Fourth, as in *Harris* and *Jones, supra*, this informer tip was further corroborated by the fact it was identical to a tip given another officer by another informer, *see* 403 U.S. at 581, 91 S.Ct. 2075; 362 U.S. at 271, 80 S.Ct. 725, and by

the fact this informer of known reliability conveyed this tip separately to an FBI agent and a city police lieutenant and repeated it twice under questioning by Captain O'Keefe.

In sum, we think the credibility of the informer, which was proven by the magistrate's personal knowledge of his past reliability, plus the specificity and extent of the corroboration of the information supplied by the informer, were sufficient to support the magistrate's belief the identified informant's information was true. That information being credited, there clearly was probable cause for issuing the warrant and the search was therefore constitutionally valid. The District Court's order suppressing the evidence is therefore vacated and the cause remanded for further proceedings not inconsistent with this opinion.

BRIGHT and ROSS, Circuit Judges (concurring).

Except for the reservation noted below, we join the majority opinion. Taking into account the credibility of the informer, the details furnished by the informer, and the corroboration of some of those details by an FBI agent, we think the affidavit furnished "probable cause" for the issuance of the warrant. Under these circumstances, the magistrate here would know that "he [was] relying on something more substantial than a casual rumor circulating in the underworld. . . ." Spinelli v. United States, 393 U.S. 410, 416, 89 S.Ct. at 589 (1968). The affidavit need only establish the probability of criminal activity and the secreting of evidence on specific premises; proof beyond a reasonable doubt is not required. United States v. Smith, 462 F.2d 456, 460 (8th Cir. 1972), and cases cited therein.

We do not agree with the majority's view that the *Harris*[1] opinion is in conflict with the *Spinelli*[2] case. Rather,

1. United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971).

2. Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed2d 637 (1968).

we deem the facts in those cases distinguishable and the opinions reconcilable.

> In *Harris*, the plurality opinion of the Chief Justice distinguished the facts from those in *Spinelli* on the ground that the warrant in *Harris* was found valid because the informant's tip "recount[ed] personal and recent observations by an unidentified informant of criminal activity," thus showing that the information had been gained in a reliable manner. These facts served to distinguish the tip in *Harris* from that held insufficient in *Spinelli*, in which the affidavit failed to explain how the informant came by his information, *Spinelli, supra*, 393 U.S. at 416, 89 S.Ct. 584. United States v. Harris, 403 U.S. at 579, 91 S.Ct. 2075. [United States v. Smith, *supra*, 462 F.2d at 460 n. 3.]

LAY and HEANEY, Circuit Judges (dissenting).

We respectfully dissent.

As late as May, 1972, this court in LeDent v. Wolff, 460 F.2d 1001 (8 Cir. 1972), acknowledged that the tests of Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), are "still controlling." The majority of this court today discards the second prong of the *Aguilar* test, i. e., whether the affidavit discloses the underlying circumstances as to how the informant gained his information so as to demonstrate sufficient probability of credibility to allow a search. The majority opinion does so because it senses an "inclination of the present Supreme Court to relax the standards by which the credibility of informers tips are to be judged." We refuse to speculate as to what that court may do in the future preferring to rest our judgment on what it has done to date.

Spinelli v. United States, supra, did not lay down any new rule of law. To "overrule" *Spinelli* might change the

result there reached but hardly would alter the viable principles of *Aguilar* which still rationally and logically remain the law. *Spinelli* did very little more than offer explication to the principles of *Aguilar* under a different factual setting.

The majority opinion suggests that United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971) has destroyed the underpinnings of the "underlying circumstance" rule of *Aguilar*. We respectfully suggest this misreads *Harris* and its relationship to *Aguilar* and *Spinelli*. The search warrant in *Harris* was attacked on the ground that the *reliability* of the informant was not established. The plurality opinion of Chief Justice Burger upheld the warrant finding (1) that sufficient factual foundation for believing the informant was presented (Justice Stewart concurring) and (2) that since the informant's statement was against his own penal interest, additional basis for crediting the tip was provided. (Justice White concurring.) The Chief Justice, relying upon Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), distinguished *Spinelli* saying:

> "The affidavit in the present case, like that in *Jones*, contained a substantial basis for crediting the hearsay. *Both affidavits purport to relate the personal observations of the informant—a factor that clearly distinguishes Spinelli, in which the affidavit failed to explain how the informant came by his information.* Both recite prior events within the affiant's own knowledge . . . indicating that the defendant had previously trafficked in contraband. These prior events again distinguish *Spinelli*, in which no facts were supplied to support the assertion that Spinelli was 'known . . . as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers.' *Spinelli, supra*, at 422 [89

S.Ct. 584]." (Emphasis ours.) United States v. Harris, *supra*, at 581, 91 S.Ct. at 2081.

The only qualification in *Harris* of *Spinelli* is found in the plurality opinion where four justices discounted the "*dictum*" in *Spinelli* that the defendant's reputation cannot be used in weighing probable cause. 403 U.S. at 582, 91 S.Ct. 2075 (1971).

However, what is germane here is that the *Aguilar* test requiring the disclosure of underlying circumstances which show that the informant has gained his information in a reliable way, still must be applied. The trial court found this information missing. The only circumvention of this rule is found in the factual setting of Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1957). See, e. g., United States v. Mitchell, 425 F.2d 1353 (8 Cir. 1970), cert. denied, 400 U.S. 853, 91 S.Ct. 85, 27 L.Ed.2d 90. However, the clear admonition in *Spinelli* has never been overruled or even doubted. It was there said:

> "A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which—even when partially corroborated —is not as reliable as one which passes *Aguilar's* requirements when standing alone.
>
> ". . . In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." Spinelli v. United States, 393 U.S. at 415-416, 89 S.Ct. at 589.

It is this caution which should control our decision here.

The fallacy of the majority's ruling is that it assumes, without discussion, the conclusory charge that the defendants had burglarized the house. The affidavit is without any detail which discloses that these informants had gained this information in a reliable way, and unlike *Draper* it is without any description of the suspects or any projections concerning their future activities. No detailed information is provided that these men (1) placed the guns in a large paste board box or (2) that they would be at Magnuson's apartment with such a box at the time and at the place where they were later observed and found. There is no nexus made by the informants between the conclusory statement that the men committed the burglary and that they might be located at a certain time and place which might have provided further credence to their original Charge. Cf., Draper v. United States, supra. The fact that the informants stated that the men used a certain car with license plates belonging to Magnuson hardly corroborates the informants' charge that they had committed the offense. This does not differ significantly from the unlisted telephone number rejected in *Spinelli*.[1]

There are undoubtedly some that feel that *Aguilar* and *Spinelli* impose technicalities which unduly restrict effective police enforcement. We are not in this group. *Spinelli* and *Aguilar* impose the simple common sense requirement that the "unidentified reliable informant" reveal how he knows that the accused participated in illegal activities. *Draper* relaxes this requirement only where the informant

1. The majority of our court erroneously gave credence to this information, however, we were overruled by the Supreme Court. Mr. Justice Harlan observed:

> "Here, the only facts supplied were that Spinelli was using two specified telephones and that these phones were being used in gambling operations. This meager report could easily have been obtained from an offhand remark heard at a neighborhood bar." Spinelli v. United States, 393 U.S. at 417, 89 S.Ct. at 589.

describes in sufficient detail future activities which subsequently occur. The rationale of *Draper* is that where the affidavit discloses sufficient corroborative factors which demonstrate a guarantee of personal knowledge of the "modus operandi" of the criminal activity, the necessary trustiworthiness as to the source of the information, as distinguished from the reliability of the informant, is provided. If we stay with these simple rules we will not impede effective law enforcement. If we chip away at them, we will not only erode the rights of all citizens under the Fourth Amendment but we will, as well, confuse law enforcement officers in the performance of their duties.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 73-1326, 73-1327 and 73-1370

United States of America,
Appellee,

v.

James Marihart, Edwin Kinsley, and Michael Guerra,
Appellants.

Appeal from the United States District Court
for the Northern District of Iowa

SLIP OPINION

Submitted: November 23, 1973

Filed: March 6, 1974

Before HEANEY, ROSS and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

The principle issue on this appeal concerns the extent to which inaccuracies or misrepresentations in an affidavit by a police official vitiates a search warrant issued pursuant thereto.

Defendants James Marihart, Edwin Kinsley and Michael Guerra were convicted by a jury verdict on four

counts of violating 18 *U.S.C.* § 1202(a)(1), illegal possession of firearms by previously convicted felons. The defendants were sentenced to two years imprisonment on Counts I, II and III to be served consecutively, and two years imprisonment on Count IV, to run concurrently with the sentence on Count I.

This case was originally set for trial on April 26, 1972. Prior to the trial date, the defendants filed a motion to suppress evidence which was granted by the trial court. On appeal that order was vacated and the cause remanded pursuant to an *en banc* hearing before this court. *United States* v. *Marihart*, 472 F.2d 809 (1972). Although a part of the factual background of the case is set forth in that opinion, we will recount the facts relevant to the issues presented for our determination on this appeal.

On the evening of October 16, 1971, George Lorenger's residence and firearms dealership was burglarized. Lorenger sold guns in Iowa, Nebraska, South Dakota and California. The four firearms which comprise the four counts of the indictment had been purchased from a dealer in Faribault, Minnesota. On October 17, F.B.I. Special Agent Oxler became apprised of the fact that the defendants might be involved in the Lorenger burglary and were driving a 1962 blue Ford station wagon. Oxler, at this time, was investigating a federal crime of possession of stolen money orders. On October 20, a vehicle matching the description given to Oxler pulled up to a residence and the occupants removed a large cardboard box from the rear of the automobile, which they had difficulty carrying into the residence. After they had vacated the premises, local police officers maintained a watch on the house for three to four hours. During the surveillance, Captain Frank O'Keefe of the Detective Bureau, Sioux City Police Department, based on the information supplied by Oxler

and others, obtained a search warrant from a Sioux City Municipal Court Judge.[1] Upon breaking into the residence in execution of the search warrant the police found several rifles and shotguns, including the four guns upon which the indictment rests.

Appellants initially contend that the trial court erred in overruling their motion to suppress evidence. They allege that the affidavit and oral testimony presented by Captain O'Keefe to the issuing magistrate in support of affiant's request for a search warrant contained erroneous information.

Our earlier opinion disposed of the issue as to whether "probable cause" could be found based upon the information presented to the magistrate. We held that "probable cause" existed after applying the tests of *Aguilar* v. *Texas*, 378 U.S. 108, 84 S. Ct. 1509 (1964) and *Spinelli* v. *United States*, 393 U.S. 410, 89 S. Ct. 584 (1969).

On this appeal, we are asked to scrutinize again the affidavit and the oral testimony and redetermine the "probable cause" issue in light of evidence adduced at the trial which the defendants allege raises some question as to the accuracy of the information supplied to the issuing magistrate.

During the course of the trial the court granted appellants a hearing on their renewed motion to suppress. They were allowed to present evidence (outside the jury's presence) testing the accuracy of Captain O'Keefe's affidavit and testimony. Special Agent Oxler and other law enforcement officials mentioned by Captain O'Keefe were examined exhaustively with respect to what information they had supplied Captain O'Keefe before his affidavit

1. Captain O'Keefe's affidavit and a summary of his testimony before the issuing magistrate is set out in 472 F.2d at p. 810-811.

and testimony were supplied to the magistrate. After receiving the evidence the trial court denied appellants' renewed motion to suppress.

The government contends that since there was no initial showing of wilful misrepresentation or bad faith on the part of the affiant, the affidavit (and testimony) in support of the application for the search warrant was not subject to impeachment. Further, that since the trial court did permit appellants during the course of the trial to make inquiry into the accuracy of the affiant, and an examination of the record discloses no material discrepancies, appellants' claim is without merit.

Appellants contend that the record discloses material inaccuracies to such an extent that it can be said that the affiant did not have reasonable grounds for believing the truth of the allegations he made and therefore good faith is lacking. In the alternative they ask that we remand to the district court with directions to ascertain from affiant the exact state of his knowledge at the time of the signing of the affidavit.[2]

The Supreme Court has not passed on the extent to which a court may permit an examination with respect to the validity of a warrant facially valid and when the allegations of the underlying affidavits establish "probable cause." *Rugendorf* v. *United States*, 376 U.S. 528, 531-532 (1964); *Kipperman*, "Inaccurate Search Warrant Affidavits As a Ground for Suppressing Evidence," 84 *Harv. L. Rev.* 825 (1971). We have not taken a definitive position on this issue but have indicated that under appropriate circumstances such an inquiry may be made. *United States* v. *Bridges*, 419 F.2d 963, 966, n. 4 (CA8 1969); *Hunt*

2. Affiant, Captain O'Keefe, was not called by either party in connection with the renewed motion to suppress made during trial. The parties stipulated as to the affidavit and the testimony given by Captain O'Keefe before the issuing magistrate.

v. *Swenson*, 466 F.2d 863 (CA8 1972); *Lowrey* v. *United States*, 161 F.2d 30, 34 (CA8 1947).[3]

The trial court conducted a hearing in which appellants were permitted to examine into the truthfulness of Captain O'Keefe's affidavit and testimony. Thus we need not now delineate the showing necessary to obtain such a hearing. The trial court weighed the testimony allegedly in conflict with the affidavit and denied the renewed motion to suppress. We are satisfied that there is substantial evidence to support the conclusion reached and no mistake was made. *Lowrey* v. *United States*, *supra*; *United States* v. *McNally*, 485 F.2d 398, 406 (CA8 1973); *Gullett* v. *United States*, 387 F.2d 307 (CA8 1967).

We have not as yet delineated the standards to be applied in testing the validity of a warrant where a hearing has been granted. In *United States* v. *Bridges*, *supra*, 419 F.2d at 966 n. 4, we indicated that fraudulent intent and materiality were factors to be considered.

The Seventh Circuit in *United States* v. *Carmichael*, *supra* at 2129, has held as follows:

> * * * Evidence should not be suppressed unless the trial court finds that the government agent was either recklessly or intentionally untruthful. * * * Even where the officer is reckless, if the misrepre-

3. At least two circuits have indicated that such a hearing should be held "when there has been an initial showing of falsehood or other imposition on the magistrate." *United States* v. *Dunnings*, 425 F.2d 836, 840 (CA2 1969); *United States* v. *Rael*, 467 F.2d 333 (CA10 1972). The Seventh Circuit has recently ruled, in an *en banc* hearing that a defendant is entitled to a hearing to attack a "facially sufficient affidavit" if he initially shows either: "(1) any misrepresentation by the government agent of a material fact, or (2) an intentional misrepresentation by the government agent, whether or not material." *United States* v. *Carmichael*, (No. 71-1492, CA7 October 9, 1973), 14 CrL 2128, 11-14-73. The foregoing rule is limited to testing the credibility of government agents whose affidavits or testimony are before the magistrate.

sentation is immaterial, it did not affect the issuance of the warrant and there is no justification for suppressing the evidence. * * * However, we conclude that if deliberate government perjury should ever be shown, the court need not inquire as to the materiality of the perjury. The fullest deterrent sanctions of the exclusionary rule should be applied to such serious and deliberate government wrongdoing.

The rule we announce today is intended only to test the credibility of government agents whose affidavits or testimony are before the magistrate.

The Fifth Circuit in *United States* v. *Thomas*, (No. 73-1403, CA5 December 19, 1973), 42 LW 2369 has held that "affidavits containing misrepresentations are invalid if the error was (1) committed with an intent to deceive the magistrate, whether or not the error is material to the showing of probable cause, or (2) made non-intentionally, but the erroneous statement is material to the establishment of probable cause for the search." *Accord*, *United States* v. *Bowling*, 351 F.2d 236, 241-242 (CA6 1965).

We adopt the Seventh Circuit standards[4] and apply them to the case at hand.

We now briefly review the substance of the affidavit and testimony submitted to the issuing magistrate by Captain O'Keefe with particular attention to those portions claimed by appellants to be so inaccurate as to be untruthful.

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4. We agree with the Seventh Circuit that completely innocent misrepresentation should not support suppression even if material. The primary justification for the exclusionary rule is to deter police misconduct. Furthermore, if the officer reasonably believes facts which facially indicate a crime has been committed, then even if mistaken, he has probable cause for believing a crime has been committed. *Carmichael*, *supra*.

O'Keefe in his affidavit recited that: the Lorenger home had been burglarized on October 16, 1971 and thirty-three firearms taken; he had received information from a reliable confidential informant that appellants were involved; they were then driving a 1962 blue Ford station wagon, 1971 plates Iowa 47-4556 registered to Ray Magnusson; on October 20, 1971 (the date he obtained the search warrant) he was informed by Special Agent Oxler that the 1962 blue Ford station wagon had stopped at 1807 Jackson Street and three men believed to be the burglars previously named had unloaded a large pasteboard box which with difficulty was carried into the residence indicated. O'Keefe further testified that Special Agent Oxler and Sioux City Police Lieutenant Larson had received similar tips from the same informant; Sergeant Stewart, Sioux City Police, had received an identical tip from another informant. O'Keefe revealed the name of Oxler and Larson's informer to the judge. The judge recognized this informer as a person who had previously supplied reliable information upon which the judge had acted and which proved correct. He relied upon the informant's tip and made no effort to ascertain the credibility of Stewart's informer. The warrant was issued and executed by the police officers who found in the apartment at 1807 Jackson, described in the affidavit, the four guns which are the subject of the indictment.[5]

Appellants' principle claims of inaccuracies in O'Keefe's affidavit and testimony allegedly established by testimony of the officers pursuant to appellants' renewed motion to suppress, are as follows: (1) O'Keefe stated to the magistrate that Special Agent Oxler and Lt. Larson received similar tips from the same informant, whereas Oxler testified that he never told O'Keefe the name of his informant. The record reveals Oxler testified

5. For further details see 472 F.2d at 810-811.

"I would seriously doubt if I named a name. I think from past experience he [O'Keefe] was fully aware who my informant was * * *. We didn't have to name names. It was known as of just a matter of fact between us." (2) Appellants claim Lt. Larson testified he didn't tell O'Keefe the name of his informant. The record reveals his testimony was: "I don't believe so, but I am not sure." (3) Appellants claim O'Keefe erred in stating Sergeant Stewart had called him 3 days before the search warrant was issued, whereas Stewart testified he had no contact with O'Keefe about an informant's tip until the day the warrant was issued. A reading of this transcript, however, reveals Sergeant Stewart, at the time of his testimony, was not certain when he called O'Keefe and that "it is possible" he had called O'Keefe on Sunday, October 17, 3 days before the warrant was issued.

Other inaccuracies in a similar vein are urged by appellants. After examining the complete record we are satisfied inaccuracies are peripheral in nature and there were no material misstatements made in connection with the securing of the search warrant. The most that can be said is that the officers exhibited some uncertainty in recollecting when certain conversations with O'Keefe took place which is understandable considering that considerable time had elapsed. We are abundantly satisfied that there were no material misstatements made in securing the warrant and no absence of good faith shown.[6] We are

6. The trial court conducted an in camera hearing during which Special Agent Oxler, Lt. Larson and Sergeant Stewart testified. The transcript thereof was sealed and furnished to this court. It reveals that under order of the court Oxler and Larson each revealed the name of his informant. They were identical. Stewart revealed the name of his informant who was another person. Stewart also stated that after rereading his reports it was true that he had called O'Keefe on Sunday. (This was consistent with O'Keefe's statement.) The testimony indicated the informants were fearful of their lives if their identity was revealed. We do not rely on the in camera hearing but do observe that this testimony further supports the government's claim that no material inaccuracies were stated in support of the application for the search warrant.

satisfied that the trial court properly overruled the renewed motion to suppress. The remanding of this matter for the interrogation of affiant O'Keefe is unwarranted.

Defendants also contend that the government failed to prove that the firearms in question were moving in interstate commerce or affecting interstate commerce. The United States Supreme Court had held that 18 U.S.C. § 1202[7] requires that when a person is charged with receiving or possessing firearms, the government must show that they were moving in interstate commerce or affecting interstate commerce. *United States* v. *Bass*, 404 U.S. 336 (1971). In the *Bass* case, 404 U.S. at 350, the court stated that the government may show a nexus with interstate commerce in a variety of ways. "For example, a person 'possesses . . . in commerce or affecting commerce' if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce."

In *United States* v. *Pleasant*, 469 F.2d 1121 (CA8 1972) we held that the government had failed to show directly or by inference that the weapon there involved was traveling in or affected commerce. In so doing we suggested the type of proof that might be used. Upon retrial the government offered proof of the kind suggested. We affirmed. *United States* v. *Ronald X. Pleasant*, ... F.2d ..... (No. 73-1343, CA8 January 9, 1974).

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7. § 1202. Receipt, possession, or transportation of firearms—

Persons liable; penalties for violation

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, . . . and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined not more than $10,000 or imprisoned for not more than two years or both.

We are satisfied that the government's evidence was sufficient to sustain its burden of establishing that the firearms in question possessed by appellants were moving in or affecting commerce. The firearms were purchased from a federally-licensed firearms dealer in Minnesota who sold firearms throughout the various states. The particular weapons were shipped from Minnesota to a federally-licensed dealer in Sioux City, Iowa, George Lorenger, who sold firearms in interstate commerce as well as in Iowa. One of the firearms arrived about two weeks prior to the theft, another was stolen the day it was delivered and before it was uncrated. One of the defendants who worked with the other two defendants in secreting the stolen firearms in the apartment where they were seized admitted to the break-in and theft of the weapons from Lorenger, the firearms dealer. The foregoing evidence was sufficient to support the jury finding that the weapons were moving interstate and that possession thereof affected commerce. *See, United States* v. *Wiley*, 478 F.2d 415 (CA8 1973); *United States* v. *Glasgow*, 478 F.2d 850 (CA8 1973); *United States* v. *Mullins*, 476 F.2d 664 (CA4 1973); *United States* v. *Brown*, 472 F.2d 1181 (CA6 1973).

The trial court's jury instruction with respect to whether defendants' possession of the firearms in question was in or affecting commerce was proper[8] and no error was committed in refusing defendants' requested instruction.

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8. In determining whether defendants' possession of a firearm was in or affecting commerce, you are to consider only what effect, if any, the defendants' possession of the firearms at the time and place as alleged in the indictment had on interstate commerce, or if it had a demonstrated connection or link with interstate commerce.

If you do not find beyond a reasonable doubt that the possession of firearms by the defendants at the time and place as alleged in the indictment affected interstate commerce or that said possession had a demonstrated connection or link with interstate commerce, then the plaintiff has failed to meet its burden of proof on this issue.

Defendants' final contention that the evidence was insufficient to support the jury's finding, as charged, that each of the defendants had previously been convicted of felonies, is without merit and need not be discussed.

Affirmed.

HEANEY, Circuit Judge, Dissenting.

I dissent for the reasons set forth in the dissenting opinion in *United States* v. *Marihart*, 472 F.2d 809, 816-817 (8th Cir. 1972).

I agree with the majority that the misrepresentations in Captain O'Keefe's affidavit were not material. Thus, I do not believe that it is necessary to decide between the views expressed by the Seventh Circuit in *United States* v. *Carmichael*, No. 71-1492 (7th Cir. October 9, 1973), and the Fifth Circuit in *United States* v. *Thomas*, No. 73-1403 (5th Cir. December 19, 1973). That choice should be made when we are presented with a case in which that issue has some bearing on the outcome. However, because the majority has chosen to express its view at this point, I must state that I view the rule followed by the Fifth Circuit as the preferable one. Under that rule, it makes no difference whether the misrepresentations were intentional or innocent, if, in fact, they were material.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1561

JAMES MARIHART, EDWIN KINSLEY, AND MICHAEL GUERRA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

An indictment filed on March 22, 1972 in the United States District Court for the Northern District of Iowa charged petitioners with four counts of possessing firearms as previously convicted felons, in violation of 18 U.S.C. App. 1202(a)(2). On April 25, 1972 the district court granted petitioners' pretrial motion to suppress. The court of appeals, sitting *en banc*, reversed, *United States* v. *Marihart*, 472 F. 2d 809 (C.A. 8), two judges dissenting (Pet. Supp. App. 1-19). Thereafter, petitioners were tried and convicted on all four counts. Each was sentenced to imprisonment for consecutive terms of two years on counts 1-3 and a concurrent two-year term on count 4. The court of appeals affirmed on March 6, 1974 (Pet. Supp. App. 20-30). The petition for a writ of certiorari, filed on April 8, 1974, is out of time under Rule 22(2) of the Rules of this Court. In any event, petitioners present no claim warranting further review.

1. The evidence showed that George Lorenger operated a firearms dealership from his home in Sioux City, Iowa. The firearms, consisting largely of rifles and shotguns, had been purchased from out-of-state wholesalers (Tr. 26-35, 47). On the evening of October 16, 1971, burglars entered Lorenger's home and removed thirty-four firearms. Seventeen were immediately recovered from an area in the rear of the house (Tr. 48-49)[1]. The following day an informant contacted F.B.I. agent David Oxler (who was at the time unaware of the burglary) and identified petitioners by name as the culprits. The informant also gave a detailed description of the Ford station wagon used in the burglary (Tr. 305-312, 331-332). Oxler passed this information along to the local chief of detectives, Captain Francis O'Keefe.

The same day Detective Lieutenant Michael Larson received a telephone call from one of his confidential informants (not the same informant who contacted Oxler) who related to Larson the identical information about the burglary, the names of the wrongdoers (petitioners) and the vehicle. Larson immediately notified Captain O'Keefe of his information (Tr. 342-343). Then, Police Sergeant Raymond Stewart relayed to Captain O'Keefe identical information concerning the burglary received from his informant (Tr. 237-239)[2].

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[1]We are lodging with the Clerk of this Court the three-volume transcript of trial, also containing the hearing on petitioners' renewed motion to suppress, conducted intermittently during the trial.

[2]At an *in camera* hearing during trial, the district court ascertained that the same informant had provided information about the burglary to both Oxler and Stewart. See note 6 of the opinion of the court of appeals in *Marihart II* (Pet. Supp. App. 27).

Prior to October 20, the F.B.I. was not investigating this offense, believing it to be local in nature. However it was investigating at least one of the petitioners for a crime involving stolen money orders; accordingly, when, on October 20, agent Oxler's informant reported that petitioners were about to use the Ford station wagon to move certain unidentified "hot" goods, he assigned agent Roger Okuniewicz to locate and watch the vehicle, and requested assistance from Captain O'Keefe (Tr. 313-314, 321-322). O'Keefe dispatched Sergeants Stewart and Wilson and Detective Holly Barron to the 1800 block of Jackson Street, where the vehicle had been sighted. Before the arrival of the city policemen, Okuniewicz observed petitioners back the station wagon to the front porch of 1807 Jackson Street, open the tailgate, and remove therefrom a large, heavy cardboard box which all three carried into the apartment building (Tr. 82). Stewart and Wilson arrived in time to see petitioners leave the apartment building empty handed and drive away together in the station wagon (Tr. 175-176). Then, the officers made inquiry of a tenant in the apartment building and ascertained that petitioners had entered a vacant apartment. Leaving Barron behind to continue a surveillance, the other law enforcement officers left to meet with Captain O'Keefe and agent Oxler for the purpose of obtaining a search warrant.

Three hours later, armed with a warrant issued by a State judge, Officers Stewart, Wilson and Barron searched the vacant apartment and discovered the seventeen missing firearms stacked in a closet and the large cardboard box nearby (Tr. 132-135, 177-179).

2. Petitioners allege that the affidavit supporting the warrant issued to search the apartment wherein the firearms were discovered failed to meet the standards enunciated by this Court in Aguilar v. *Texas*, 378 U.S.

108, and *Spinelli* v. *United States*, 393 U.S. 410.[3] The affidavit, set forth *in toto* at Pet. App. 17-20 and in *Marihart I*, 472 F. 2d 809, 810, n. 2, initially referred to the occurrence of the burglary at the Lorenger home. Then the affiant, Captain O'Keefe, stated that he had received information from a "reliable confidential informant" that petitioners were involved in the burglary, and at the time were driving a 1962 blue Ford station wagon, Iowa plates 47-4556, registered to one Ray Magnuson. O'Keefe related information from F.B.I. agent Oxler relative to the observation of petitioners driving to 1807 Jackson Street in that station wagon, and unloading a large weighty box into a vacant apartment of a dwelling under the custody of Ray Magnuson. Finally, the affiant indicated that Oxler was familiar with petitioners and the vehicle as a result of prior investigations.

Both the district court and court of appeals found that the affidavit contained sufficient corroborative information to support the credibility of the unnamed informant. The issue upon which those courts could not agree involved the presence of adequate underlying circumstances from which the informant drew his conclusion regarding the criminal conduct of petitioners. *Aguilar*, *supra*, 378 U.S. at 114. The majority of the court of appeals properly analyzed this issue in *Marihart I*, finding that any defects in the affidavit as judged by *Aguilar* were overcome by the detailed nature of the informant's report, the prior knowledge of the affiant (independent of the informant's revelations) that the burglary had occurred, the corroboration by agent Oxler and the oral testimony before the

[3]Although we address ourselves to the merits of petitioners' claims, we have not abandoned our contention, raised in the courts below, that petitioners lack standing to contest the search of the vacant apartment. See *Brown* v. *United States*, 411 U.S. 223. We devote our brief to a review of petitioners' claim in recognition of the decision by the court of appeals to do the same and electing not to base its holding on the question of standing. 472 F. 2d at 811-812; Pet. Supp. App. 7.

issuing State magistrate[4] (Pet. Supp. App. 8-15). See *Draper* v. *United States* 358 U.S. 307; *United States* v. *Harris*, 403 U.S. 573, 580-583; *Whiteley* v. *Warden*, 401 U.S. 560, 565, n. 8; *Spinelli* v. *United States*, *supra*.

3. Petitioners also claim that Captain O'Keefe made material misstatements in his affidavit and testimony before the issuing judge. In support of this contention they rely upon the trial testimony of agent Oxler and policemen Larson and Stewart.[5] But a reading of this testimony in context does not sustain petitioners' argument.

Initially, petitioners point to the representation by O'Keefe in his oral testimony that Oxler stated that he "seriously doubted" mentioning the informant's name to O'Keefe (Pet. 11-12). However, this discrepancy is slight in light of Oxler's admission that without doubt O'Keefe was aware of the identity of the informant from previous encounters and that it was simply unnecessary to state the name (Tr. 334-335). As stated by Oxler, the informant's name "was known as a fact between us even though names aren't mentioned" (Tr. 335). The crucial question is not whether Oxler made a particular statement attributed to him in the affidavit regarding the name of the informant but whether the identity of the informant whose name was revealed to the State judge and recognized as previously reliable was correct. It is clear that there was no misidentification.

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[4]The testimony of Captain O'Keefe before a State court has been incorporated into this record, and is set forth at Pet. App. 21-26. There, Captain O'Keefe stated that he furnished the issuing judge with additional information, supplementing the affidavit, such as the reports of Larson and Stewart containing the identical information as that given by Oxler (albeit from separate sources) and the identities of the two informants, one of whom was known to the judge, who issued the warrant, as having been reliable in the past.

The other incident which petitioners specifically point to (Pet. 12-13) deals with O'Keefe's statement at the State court hearing that Oxler had passed along to him the description of the station wagon used by the burglars. At trial, Oxler was asked whether his informant had given him a description of the vehicle; Oxler replied, "I cannot say for sure. I do not know" (Tr. 332). Petitioners misinterpret the agent's response as an admission that he was unaware of the identity of the station wagon when he relayed information to O'Keefe concerning the burglary. In fact, the agent merely remarked that at the time he was testifying—more than a year after the offense and the conversations occurred (Tr. 339)—he could not recall exactly what information he had given to O'Keefe. However, agent Oxler maintained that he had been aware of the station wagon both from his own surveillances of petitioners and the conversations with his informant (Tr. 331), and that he had indeed related to O'Keefe "details as to the information I had available" (Tr. 334, 335). Thus, petitioners have not shown that O'Keefe's statement as to the source of his knowledge of the description of their vehicle was a misrepresentation. See *United States* v. *Various Gambling Devices*, 478 F. 2d 1194, 1199 (C.A. 5)[6].

Because petitioners have failed to demonstrate the existence of any misrepresentations, the Court at this juncture need not resolve any differences which might exist among courts of appeals on the question whether misrepresenta-

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[5]Captain O'Keefe was not called by any of the parties at trial.

[6]Other alleged misstatements argued to the court of appeals and not repeated here are equally insubstantial. See the opinion of the court below (Pet. Supp. App. 26-28).

tions by an affiant, even if innocent, should be disregarded in determining whether the magistrate has been furnished with sufficient probable cause to issue a warrant. Compare *United States* v. *Carmichael*, 489 F. 2d 983 (C.A. 7, with *United States* v. *Thomas*, 489 F. 2d 664 (C.A. 5)[7].

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.

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[7]Both *Carmichael* and *Thomas* hold that a deliberate misrepresentation, even if immaterial to the showing of probable cause, will invalidate a warrant. *Thomas* further holds that an unintentional misrepresentation, if essential to the showing of probable cause, will invalidate a warrant (489 F. 2d at 669); whereas *Carmichael* would not invalidate a warrant containing a material misrepresentation unless it was made recklessly (489 F. 2d at 989). Petitioners do not claim that the alleged misstatements by Captain O'Keefe were deliberately or recklessly made and therefore do not rely on *Carmichael*. *Thomas* does not avail petitioners because the alleged misstatements were not material to the showing of probable cause; that is, their elimination would not negate the existence of probable cause (see *Thomas*, *supra*, 489 F. 2d at 668). There is no doubt that the issuing judge was aware of the proper identity of the informant even if O'Keefe was incorrect in stating that Oxler had provided the name. As noted, O'Keefe already knew the informant's identity. Moreover, the record shows that Stewart had the same informant, and does not preclude the possibility that Stewart revealed him to O'Keefe. As to how O'Keefe learned of the station wagon, as noted, Oxler may well have given the description to O'Keefe. If not Oxler, then Lt. Larson could have been the one to provide this information (Tr. 345). Larson's source, while not personally known to the issuing judge to have been previously reliable, still could be credited since his information was in all respects identical to that furnished to the two other law enforcement officers by an informant of proven credibility.

[1031-1974-4]